Agenda Item Form

Agenda Date: **Sept. 21, 2004**

Districts Affected: Districts 1-8
Dept. Head/Contact Information: Tony Huerta Montoya, Director (541-4288)

Type of Agenda Item:

☒Resolution
☐Tax Installment Agreements
☐RFP/ BID/ Best Value Procurement
☐Application for Facility Use
☐Interlocal Agreements
☐Other _____

☐Staffing Table Changes
☐Tax Refunds
☐Budget Transfer
☐Bldg. Permits/Inspection
☒Contract/Lease Agreement

☐Board Appointments
☐Donations
☐Item Placed by Citizen
☐Introduction of Ordinance
☐Grant Application

Funding Source:

☒General Fund
☐Grant (duration of funds: _____ Months)
☐Other Source: _____

Legal:

☒ Legal Review Required   Attorney Assigned (please scroll down): Ruth Reyes ☒ Approved   ☐ Denied

Timeline Priority: ☒High   ☐Medium   ☐Low   # of days:_____

Why is this item necessary: Business Software Consultants Software License Agreement – To allow the Information Technology Department to migrate all Historical Human Resources Data maintained under the old legacy PERMIS System to our current enterprise environment. This will allow the Human Resources Department to query historical data without incurring continued charges from the County of El Paso, where it currently resides.

Explain Costs, including ongoing maintenance and operating expenditures, or Cost Savings: Total amount is $36,000.00 for the transfer of the Historical Data from the County environment to the City's and for implementation of the software that will make data available to the Human Resources Department.

Statutory or Citizen Concerns:
NONE

Departmental Concerns:

The City of El Paso's Historical HR Database still resides within the County's mainframe computer. The County is moving to another computer environment and we need to migrate this data to our system as soon as possible.

RESOLUTION

BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF EL PASO:

THAT the Mayor or the City Manager be authorized to sign the Software License Agreement and Maintenance Agreement by and between the **CITY OF EL PASO** and **BUSINESS SOFTWARE CONSULTANTS** for the acquisition and implementation of the BSC Human Resources Historical Data Base Software in the amount not to exceed THIRTY-SIX THOUSAND AND 00/100 DOLLARS ($36,000.00).

ADOPTED this 21st day of September 21, 2004.
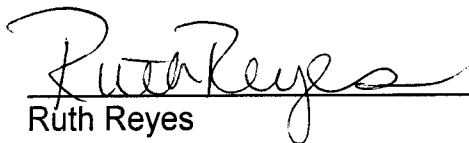
CITY OF EL PASO

_____
Joe Wardy
Mayor
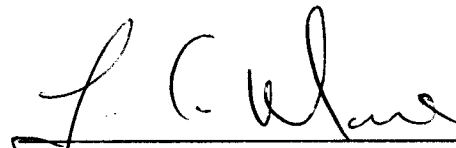
ATTEST:

_____
Richarda Duffy Momsen
City Clerk

APPROVED AS TO FORM: APPROVED AS TO CONTENT:

_____   _____
Ruth Reyes   Tony Huerta-Montoya, Director
Assistant City Attorney   Information Technology Department

BSC

Business Software Consultants

7101 Knollwood Drive
Navarre, Florida 32566-8818
850-936-6603/800-798-4468
busswcorp@aol.com

<u>SOFTWARE LICENSE AGREEMENT</u>

THIS AGREEMENT ("Agreement") is hereby entered into between Business Software Consultants, with offices at 7101 Knollwood Drive, Navarre, Florida 32566-8818 ("Licensor") and City of El Paso (Licensee) with offices at Two Civic Center Plaza, 4th Floor, El Paso, Texas 79901-1196, ("Licensee") on the following terms and conditions:

1. **<u>Licensed Product</u>.** The parties are entering into this Agreement to establish an arrangement whereby Licensor is licensing certain application software programs, as described more fully in the attached Product Schedule and accompanying Documentation (the "Licensed Product") on terms and subject to the conditions set forth herein.

2. **<u>Scope of Use</u>.** The Licensor expressly reserves all rights in the Licensed Product not specifically granted to Licensee.

    (a) **<u>Delivery & Installation</u>.** The Licensor shall deliver the Licensed Product to Licensee on CD or DVD media. Unless otherwise agreed in writing, the Licensor shall be responsible for installing the Licensed Product on the computer system provided by Licensee. Licensee shall ensure that: (i) all required data is in proper format; (ii) the computer system and associated software is properly installed and operated by qualified personnel according to recommended environmental site conditions, and (iii) no other software or equipment having an adverse impact on the Licensed Product have been introduced.

    (b) **<u>Operating License</u>.** Licensee is granted a nonexclusive license to install, store, load, execute and display (collectively, "Use") as many copies of the Licensed Product as it deems necessary in support of Licensee's internal business activities. The Licensed Product may be deleted from the machine on which it was originally installed and may be relocated to and Used on another machine by Licensee, subject to the foregoing limitations.

    (c) **<u>Transfer of License</u>.** Except as specifically authorized in another provision of this Agreement, neither this Agreement, nor any rights or obligations hereunder, may be transferred, assigned, delegated, sublicensed, relocated or

moved to another person, place or machine, in whole or in part, without Licensor's prior written consent and any attempt to the contrary shall be void and of no legal effect.

3.   **Term.** This Agreement shall commence on the date March 1, 2004 and shall continue in full force and effect in perpetuity, unless terminated earlier in accordance with Section 12 ("Termination").

4.   **Program Code.**   The Licensed Products shall be provided in source code form strictly for internal Use by Licensee personnel, subject to the restrictions set forth in Section 8 ("Confidential & Proprietary Information") and elsewhere in this Agreement.

5.   **Acceptance.** A Licensed Product shall be deemed accepted by Licensee unless Licensee notifies Licensor in writing of a material defect in the Licensed Product within ten (10) business days after delivery and commencement of the Operating License.

6.   **Support Services.**

    (a)   Maintenance. The Licensor shall provide support services for the Licensed Product beyond any warranty coverage described in Section 9 ("Warranties") in accordance with the attached Licensed Product Maintenance Agreement.

    (b)   Training. Licensor shall, at no additional fee, provide training to Licensee's employees in the operation of the Licensed Product. This training program does not include and Licensee shall pay Licensor's out-of-pocket travel costs associated with the training services.

7.   **Prices & Payment.** The prices and fees for Licensed Products or other technology provided hereunder, any Support Services and other deliverables are set forth on the Product Schedule. License Fees shall be invoiced one-half (1/2) on execution and one-half (1/2) on acceptance of the Licensed Product under this Agreement. Invoiced amounts shall be paid within thirty (30) days from date of invoice. Licensee may not withhold or "setoff" any amounts due hereunder. Any late payment shall be subject to any costs of collection (including reasonable legal fees) and shall bear interest at the rate of one (1) percent per month or fraction thereof until paid. Prices quoted do not include and Licensee shall not pay tax (including interest and penalties imposed thereon) on the transaction contemplated herein.

8.   **Confidential & Proprietary Information.**

    (a)   Acknowledgment.   Licensee hereby acknowledges that the Licensed Product (including any Documentation, source code, translations,

compilations, partial copies and derivative works) contains confidential and proprietary information belonging exclusively to Licensor or such third party as may be identified on the Licensed Product or applicable Documentation ("Confidential & Proprietary Information"). Confidential & Proprietary Information does not include: (i) information already known or independently developed by the Licensee outside the scope of this relationship by personnel not having access to any Confidential & Proprietary Information; (ii) information in the public domain through no wrongful act of the Licensee, or (iii) information received by the Licensee from a third party who was free to disclose it.

(b) **Covenant.** With respect to the Confidential & Proprietary Information, and except as expressly authorized herein, the Licensee hereby agrees that during the Term and at all times thereafter it shall not use, commercialize or disclose such Confidential & Proprietary Information to any person or entity, except to its own employees having a "need to know" (and who themselves are bound by similar nondisclosure restrictions except pursuant to a court or government agency request, subpoena or order), and to such other recipients as the Licensor may approve in writing; provided that all such recipients shall have first executed a confidentiality agreement in a form acceptable to Licensor. Neither the Licensee nor any recipient shall: (i) alter or remove from any Licensed Product or associated Documentation any proprietary, copyright, trademark or trade secret legend, or (ii) attempt to decompile, disassemble or reverse engineer the Licensed Product or other Confidential & Proprietary Information (and any information derived in violation of such covenant shall automatically be deemed Confidential & Proprietary Information owned exclusively by Licensor). The Licensee and its personnel shall use at least the same degree of care in safeguarding the Confidential & Proprietary Information as it uses in safeguarding its own confidential information, but in no event shall less than due diligence and care be exercised. Upon termination, Licensee shall return or destroy all Confidential & Proprietary Information in its possession or control and cease all further use thereof.

9.   Warranties.

(a)   **Non-infringement Warranty.** Licensor represents and warrants that the Licensed Product, when properly used as contemplated herein, will not infringe or misappropriate any United States copyright, trademark, patent, or the trade secrets of any third persons. Upon being notified of such a claim, Licensor shall (i) defend through litigation or obtain through negotiation the right of Licensee to continue using the Licensed Product; (ii) rework the Licensed Product so as to make it non-infringing while preserving the original functionality, or (iii) replace the Licensed Product with functionally equivalent software. If none of the foregoing alternatives provide an adequate remedy, Licensee may terminate all or any part of this Agreement and recover amounts paid for the infringing Licensed Product.

(b) **Limited Performance Warranty.** Licensor represents and warrants for a period of one (1) year ("Warranty Period") that it will make its best effort to ensure the Licensed Product operates substantially in accordance with the applicable Documentation; provided, that (i) the Licensed Product is installed, implemented and operated in accordance with all instructions supplied by Licensor; (ii) Licensee notifies Licensor of any such defect within ten (10) calendar days after the appearance thereof; (iii) Licensee has properly installed all updates made available with respect to the Licensed Product, and updates recommended by Licensor with respect to any third party software products (including operating system software) that materially affect the performance of the Licensed Product; (iv) Licensee has properly maintained all associated equipment, software and environmental conditions in accordance with applicable specifications and industry standards; (v) Licensee has not introduced other equipment or software creating an adverse impact on the Licensed Product; (vi) Licensee has paid all amounts due hereunder and is not in default of any provision of this Agreement; (vii) any Functional Design or Specification provided by Licensee is an accurate and complete rendering of the relevant features, applicable interfaces and associated operating environment, and (viii) Licensee has made no changes (nor permitted any changes to be made other than by or with the express approval of Licensor) to the Licensed Product source code.

(c) **No Undocumented Features.** Licensor represents and warrants that (i) the Licensed Product will not contain any timer, counter, lock or similar device (other than security features specifically approved by Licensee in the specifications) that inhibits or in any way limits its ability to operate, and (ii) it will scan the Licensed Product with commercially available anti-virus software and shall use due diligence to remove viruses capable of being detected with such software. All corrections shall be as fully warranted as the original work through expiration of the original Warranty Period.

(d) **Warranty Disclaimer.** EXCEPT AS SPECIFICALLY PROVIDED IN THIS SECTION ("WARRANTIES") THE LICENSOR HEREBY DISCLAIMS WITH RESPECT TO ALL LICENSED PRODUCTS, SUPPORT SERVICES OR OTHER DELIVERABLES PROVIDED HEREUNDER, ALL EXPRESS AND IMPLIED WARRANTIES, INCLUDING ANY IMPLIED WARRANTIES OF MERCHANTABILITY, TITLE, ACCURACY, INTEGRATION OR FITNESS FOR A PARTICULAR PURPOSE. ANY UNAUTHORIZED CHANGES TO SOURCE CODE TO A LICENSED PRODUCT WILL VOID THE WARRANTY PROVIDED UNDER THIS SECTION.

10. **Notices.** Notices sent to either party shall be effective when delivered in person or transmitted by fax machine, one (1) day after being sent by overnight courier, or two (2) days after being sent by first class mail postage prepaid. A facsimile of this Agreement and notices generated in good form by a fax machine

(as well as a photocopy thereof) shall be treated as "original" documents admissible into evidence unless a document's authenticity is genuinely placed in question.

11. **Termination.** Either party may, in addition to other relief, terminate this Agreement if the other party breaches any material provision hereof and fails within ten (10) days after receipt of notice of default to correct such default or to commence corrective action reasonably acceptable to the aggrieved party and proceed with due diligence to completion. Either party shall be in default hereof if it becomes insolvent, makes an assignment for the benefit of its creditors, a receiver is appointed or a petition in Bankruptcy is filed with respect to the party and is not dismissed within thirty (30) days. Termination shall have no effect on the parties' rights or obligations to safeguard and respect Confidential & Proprietary Information under Section 8 ("Confidential & Proprietary Information"), rights or obligations under Section 9 ("Warranties"), Section 10 ("Limitation of Remedies & Liabilities") or Section 17 ("Compliance with Export Regulations").

12. **Disputes, Choice of Law.** Except for certain emergency judicial relief, which may be brought at any time, the parties agree that all disputes between them shall first be subject to the procedures in Section 12 ("Termination") and then shall be submitted for informal resolution to their respective chief operating officers. Any remaining dispute shall be submitted to a single arbitrator who shall be a former judge or attorney having experience in similar disputes. The proceedings shall be conducted pursuant to the Streamlined Arbitration Rules and Procedures and the U.S. Arbitration Act, 9 U.S.C. Sec. 1 et seq. ("Arbitration Act"). The award of the arbitrator shall include a written explanation of the decision, shall be limited to remedies otherwise available in court and shall be binding upon the parties and enforceable in any court of competent jurisdiction. THIS AGREEMENT SHALL BE GOVERNED BY AND CONSTRUED IN ACCORDANCE WITH THE SUBSTANTIVE LAWS OF THE UNITED STATES AND TEXAS, WITHOUT REGARD TO PRINCIPLES OF CONFLICTS OF LAW. The U.N. Convention on Contracts for the International Sale of Goods and the Unfair Contracts Act in the United Kingdom shall not apply to this Agreement.

13. **Independent Contractor Status.** Each party and its people are independent contractors in relation to the other party with respect to all matters arising under this Agreement. Nothing herein shall be deemed to establish a partnership, joint venture, association or employment relationship between the parties. Each party shall remain responsible, and shall to the extent allowed by law indemnify and hold harmless the other party, for the withholding and payment of all Federal, state and local personal income, wage, earnings, occupation, social security, worker's compensation, unemployment, sickness and disability insurance taxes, payroll levies or employee benefit requirements (under ERISA, state law or otherwise) now existing or hereafter enacted and attributable to themselves and their respective people.

14. **Security, No Conflicts.** Each party agrees tell the other party which information is classified or restricted data, agrees to comply with the security requirements imposed by any state or local government, or by the United States Government, and shall return all such material upon request. Each party represents and warrants that its participation in this Agreement does not conflict with any contractual or other obligation of the party or create any conflict of interest prohibited by the U.S. Government or any other government and shall promptly notify the other party if any such conflict arises during the Term.

15. **Miscellaneous.** This document and the accompanying attachments specifically referenced herein constitute the entire agreement between the parties with respect to the subject matter hereof and supersede all other communications, whether written or oral. This Agreement may be modified or amended only by a writing signed by the party against whom enforcement is sought. Except as specifically permitted herein, neither this Agreement nor any rights or obligations hereunder may be transferred or assigned by Licensee or Licensor without Licensor's and Licensee's prior written consent and any attempt to the contrary shall be void. Licensor reserves all rights not specifically granted herein. Neither party shall be liable for delays caused by events beyond its reasonable control. Any provision hereof found by a tribunal of competent jurisdiction to be illegal or unenforceable shall be automatically conformed to the minimum requirements of law and all other provisions shall remain in full force and effect. Waiver of any provision hereof in one instance shall not preclude enforcement thereof on future occasions. Headings are for reference purposes only and have no substantive effect.

IN WITNESS WHEREOF, for adequate consideration and intending to be legally bound, the parties hereto have caused this Agreement to be executed by their duly authorized representatives.

Business Software Consultants, Inc.

By: _____

Name: William S. Dalton
Title: President
Date: April 2, 2004

APPROVED this ___21ST___ day of __September__, 2004

THE CITY OF EL PASO

_____
Joe Wardy
Mayor

ATTEST:

_____
Richarda Duffy Momsen
City Clerk

APPROVED AS TO FORM: APPROVED AS TO CONTENT

_____   _____
Ruth Reyes   Tony Huerta Montoya, Director
Assistant City Attorney   Information Technology

APPROVED this ___21ST___ day of __September__, 2004

THE CITY OF EL PASO

_____
Joe Wardy
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_____   _____
Ruth Reyes   Tony Huerta Montoya, Director
Assistant City Attorney   Information Technology

PRODUCT SCHEDULE

Licensed Product	License Fee
VisualHR for Integral Payroll and HR History	$25,000.00
Installation	$115.00 per hour*
Expenses	$1,000.00
Annual Maintenance Contract	$5,000.00

*   To install the software, convert data from mainframe files to SQLServer and provide on-site training. Any customization will be billed separately at an agreed upon price. This will not exceed forty (40) hours for a total of $4,600.00.

Licensed Product Maintenance Agreement

This Software Maintenance Agreement ("Agreement") is made as of the Effective Date by and between Business Software Consultants, Inc. (Licensor) with offices located at 7101 Knollwood Drive, Navarre, Florida 32566-8818 and the City of El Paso (Licensee) with offices located at Two Civic Center Plaza, El Paso, Texas 79901-1196.

WHEREAS, Licensor has licensed to Licensee that computer software known as VisualHR for Integral Payroll and HR History; and

WHEREAS, effective use of the Licensed Software and Documentation requires certain maintenance; and

WHEREAS, Licensor is in the business of maintaining the Licensed Software and has the expertise to maintain the Licensed Software; and

WHEREAS, Licensee desires Licensor to provide Licensee with computer software maintenance for the Licensed Software.

NOW, THEREFORE, in consideration of the mutual benefits of the covenants and restrictions herein contained, Licensor and Licensee hereby agree as follows:

1. <u>Error Correction</u>. Licensor shall correct any defects in the licensed software within a reasonable time after such Defect is reported to Licensor by Licensee, as follows:
   a. <u>Problem Reporting</u>. Upon discovering a Defect, Licensee shall report the Defect.
   b. <u>Telephone Support</u>. Within four (4) hours of receiving a Service Request, Licensor shall provide unlimited telephone support in the form of consultations, assistance and advice concerning use of the Licensed Software and correction of the Defect.
   c. <u>Off-site Support</u>. If a Defect is not corrected through telephone support within twenty-four hours after receiving a Service Request, Licensor shall immediately begin conducting tests and analyses at Licensee's facility designed to reproduce, isolate and correct the Defect on a priority basis using data and information provided to Licensor by Licensee. Licensee shall submit to Licensor all such data and information which Licensor may reasonably require to reproduce the Defect on Licensor's computer located at Licensor's facility.
   d. <u>On-Site Support</u>. If a Defect is not corrected by Licensor within three calendar days after receiving a Service Request, Licensor shall send qualified software engineers to Licensee's facility for the purpose of correcting the Defect. Within seventy-two hours

of commencing such On-site Services, Licensor shall implement work around processes designed to minimize the impact of the Defect while Licensor continues on-site testing and analysis procedures for the purposes of reproducing, isolating and correcting the Defect.

2. Software Updates. Licensor shall implement all Updates on the computer within thirty days after the date that such Update is released by Licensor. Along with any Updates provided to Licensee by Licensor hereunder, Licensor shall provide documentation describing the purpose, function and utility of such Update.

3. Customer Consultations. Licensor shall provide Licensee with unlimited telephone consultations in answering questions concerning use of the Licenses Software. Licensor shall respond to any such questions on a priority basis.

4. Program Modifications. Upon discovering a desired Enhancement in the Licensed Software, Licensee may request implementation of the Enhancement. Licensor shall implement such Enhancements as of the software release of the Licensed Software next following the date implementation of the Enhancement is requested. Along with any Enhancements provided to Licensee by Licensor hereunder, Licensor shall provide documentation describing the purpose, function and utility of such Enhancement.

5. Preventive Maintenance. Upon request by Licensee, Licensor shall perform an audit, at his own cost, of the Licensed Software as applied and used by Licensee. Such audit shall involve reviewing procedures for using and operating the Licensed Software, the performance of the Licensed Software on the computer, input and output procedures and processes, and data management issues.

6. Maintenance Fees. Licensee shall pay the Maintenance Fee on each anniversary of the Effective Date, subject to receipt of notice from Licensor that such Maintenance Fee is due and payable. Payment of the Maintenance Fee shall be subject to a thirty-day grace period.

7. Customer Support Fees. The program modification services described under Program Modifications above shall be performed at the published labor rates of Licensee.

8. Termination. Notwithstanding any provision to the contrary herein, Licensee shall have the right to terminate this Agreement upon providing Licensor thirty days advance written notice.

9. Refund. If Licensee terminates this Agreement, Licensor shall pay Licensee an amount equal to the Refund Amount. The Refund Amount shall be the number of months remaining in the Maintenance Year. The Maintenance Year is the twelve consecutive month period starting with the first anniversary of the Effective Date and each anniversary thereafter.

10. Maintenance Warranty. Licensor warrants that Licensor shall maintain the Licensed Software free from all Defects and that the Licensed Software shall conform to the performance capabilities functions and other standards applicable thereto as set forth in this Agreement, the Licensed Software, and the computer. Licensor warrants that the Licensed Software shall be kept current and consistent with the tax reporting, regulatory compliance and other business needs of Licensee, and that all Updates and Enhancements shall be made available to Licensee upon release by Licensor.

11. Service Warranty. The services to be provided by Licensor hereunder shall be performed on a best efforts basis and in a timely and professional manner by qualified software personnel familiar with the Licensed Software, and shall conform to the standards generally observed in the industry for similar services. Such services shall be in compliance with all applicable laws, rules, regulations or orders.

12. Software Modifications. If the Licensed Software is modified by any party other than Licensor or Licensee, the maintenance warranty granted under Maintenance Warranty above shall be void.

13. Reasonable Assistance. Licensee shall provide Licensor with reasonable access to the Licensed Software, Documentation and the computer upon request by the Licensor for purposes of rendering services hereunder.

14. Entire Agreement. Excepting the Software License, this Agreement contains the entire understanding of the parties and supersedes previous verbal and written agreements between the parties concerning maintenance, customer support or training services for the Licensed Software.

15. Notice. Notices shall be in writing and shall be deemed delivered in person when delivered by hand or mailed postage prepaid by Certified or Registered Mail, Return Receipt Requested, to the person and address designated below. Notice shall be deemed given on the date of receipt.

Licensor: Mr. William S. Dalton
             Business Software Consultants, Inc.
             7101 Knollwood Drive
             Navarre, FL   32566-8818

Licensee: Mr. Joe Wardy, Mayor
City of El Paso
Two Civic Center Plaza
El Paso, TX 79901-1196

16. Arbitration. Any controversy or claim arising out of or relating to this Agreement, or breach thereof, shall be settled by arbitration. Judgment upon the award rendered by the arbitrators may be entered in any court having jurisdiction thereof. Qualified Arbitrators shall be selected by the parties in accordance with the Arbitration Rules. Each party shall have the right of discovery as set forth in the Federal Rules of Civil Procedure.

IN WITNESS WHEREOF, This Agreement has been executed as of the date first written above.

Business Software Consultants, Inc.

By: _____

Name: William S. Dalton
Title: President
Date:

APPROVED this ___21st___ day of ___September___, 2004

THE CITY OF EL PASO

_____
Joe Wardy
Mayor

ATTEST:

_____
Richarda Duffy Momsen
City Clerk

APPROVED AS TO FORM:

Ruth Reyes
Ruth Reyes
Assistant City Attorney

APPROVED AS TO CONTENT

Tony Huerta Montoya
Tony Huerta Montoya, Director
Information Technology